NO. 83-1212

FEB 24 1984
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CLERK

SUPREME COURT OF THE UNITED STATES

October 1983 Term

COMMONWEALTH OF KENTUCKY — PETITIONER

FEB 24 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VS.

VONDLE LEE HAMILTON — RESPONDENT

ON WRIT OF CERTIORARI TO THE
KENTUCKY SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THIS COURT MUST ACCEPT THE SUPREME COURT OF KENTUCKY'S IDENTIFICATION OF ELEMENTS OF THE OFFENSES OF RAPE AND INCEST?

STATEMENT OF THE CASE

Respondent accepts, for the most part, Appellee's recitation of the facts. However, it is important to point out a mistatement of facts made by Petitioner as well as a very telling omission.

Petitioner contends that the prosecutrix in this case denied that anyone else had had sexual intercourse with her (Brief for Petitioner 4). However, the prosecutrix admitted at the trial below that she had had intercourse on numerous occasions with her brothers (TE 139, 143, 144). For that matter, the prosecutrix's fifteen year old brother, Randy, candidly admitted that he had engaged in sexual intercourse with Sue Ann ever since he was eleven years old (TE 222, 223). This testimony was significant to Appellant's defense since it demonstrated why the treating doctor could conclude that the prosecutrix had engaged in sexual intercourse numerous times over some period of time (TE 120, 122) even though Respondent denied any misconduct.

The major and significant omission from Petitioner's Statement of the Case pertains to exactly what sentence was imposed upon Respondent as a result of him being found guilty both of the rape and the incest of the prosecutrix. As correctly indicated by Petitioner, Respondent was found guilty of rape in the first degree and his punishment was fixed at life by the jury. At the same time, he was also found guilty of incest and his sentence was fixed at ten years in the penitentiary. However, when the judge pronounced sentence against Respondent, it ordered the ten year sentence for incest to run concurrently with the life sentence (TR 119-121; App. 1-3). Since Respondent's conviction for rape in the first degree was upheld by the Supreme Court of Kentucky, he is presently serving the only sentence he ever received -- life.

SUMMARY OF THE ARGUMENT

This Court should deny this Petition for Writ of Certiorari in light of the fact that the Supreme Court of Kentucky's identification of the elements of the offenses of rape and incest establishes that indeed Respondent's conviction for both arising from the same incident cannot withstand constitutional scrutiny.

Secondly, this Court should deny the Petition for Writ of Certiorari because the sentence imposed on Respondent for the incest conviction was ordered to run concurrently with the sentence imposed for the rape conviction. Thus, the need to review the incest count cannot possibly be a pressing one since, regardless of the outcome of this case, Respondent will remain in jail for the same length of time.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI SINCE THE SUPREME COURT OF KENTUCKY HAS THE FINAL AUTHORITY TO INTERPRET ITS OWN STATE'S LEGISLATION AND SINCE THE RESOLUTION OF THE ISSUE PRESENTED WOULD HAVE NO IMPACT ON RESPONDENT'S CASE AND MINIMAL RAMIFICATIONS ON THE ADMINISTRATION OF JUSTICE.

In essence, what Petitioner is arguing in this case is that the Supreme Court of Kentucky has misinterpreted its own statute. It now wishes this Court to second guess the Kentucky Supreme Court's ruling on those statutes and to construe them in such a way as to allow there to be convictions under both without violating the Double Jeopardy Clause.

Petitioner correctly points out that the Kentucky Supreme Court has ruled in this case that rape and incest are elementally the same crime except incest requires the proof of an additional element. Petitioner would undoubtedly agree that if indeed that were a binding interpretation of the statute, then a conviction for both crimes arising from the same incident would be constitutionally prohibited since only one of the crimes (incest) would require proof of an additional fact that the other would not. See Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

Petitioner, however, contends that the Kentucky Supreme Court's ruling is erroneous in regard to how the statutes should be interpreted. It wishes this Court to second guess the Kentucky Supreme Court in terms of construing the Kentucky statutes and then apply the Blockburger test to its own construction of the Kentucky statute. However, as this Court is aware, it lacks "jurisdiction authoritatively to construe state legislation" Gooding v. Wilson, 405 U.S. 518, 520, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972). Stated otherwise, it is not this Court's "function to construe a state statute contrary to the construction given it by the highest court of a State". O'Brien v. Skinner, 414 U.S. 524, 531, 94 S.Ct. 740, 38 L.Ed.2d 702 (1974).

Since "a State's highest court is the final judicial arbiter of the meaning of state statutes" (Gurley v. Rhoden, 421 U S. 200, 208, 95 S.Ct. 1605, 44 L.Ed.2d 110 (1975)), this Court is bound by the state court's interpretation of such statutes even though it may interpret those statutes differently if it were the highest court of the state. See Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 837, fn. 9, 98 S.Ct. 1535, 56 L.Ed. 2d 1 (1978).

Of course, in cases where double jeopardy violations are claimed, this Court "must" accept the states highest court's "identification of the elements of the offenses". Illinois v. Vitale, 447 U.S. 410, 416, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). See also Brown v. Ohio, 431 U.S. 161, 167, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

In this case of first impression, the Kentucky Supreme Court has identified the elements of the offenses of rape and incest in such a way as to have them be the same except for incest which requires the proof of one additional fact. Thus, with the crimes defined as such, it is clear that the Kentucky Supreme Court's application of double jeopardy principles found in

Blockburger is valid. This standing alone should be sufficient reason for this Court not to grant certiorari.

Not only should this Court deny certiorari in light of the Kentucky Supreme Court's identification of the elements of the crimes of rape and incest, it also should deny certiorari because this case is, in essence, much ado about nothing.

The sentence imposed against Petitioner by the trial court was a life sentence for the rape charge. The ten year incest sentence was ordered to run concurrently with that life sentence. The sentence appealed was a life sentence and the sentence that Petitioner is still serving is a life sentence notwithstanding the fact that the incest conviction has been reversed. No decision by this Court either for or against Respondent will change in any way the sentence which he is to serve. See Berning v. Commonwealth, Ky., 550 S.W.2d 561, 563-564 (1977) which stands for the principle that in a non-dealth penalty case in Kentucky, all sentences imposed with a life sentence run concurrently.

In this context, the need for review of Petitioner's contention cannot possibly be deemed a pressing one. As Justice White so cogently observed in his concurrence in Benton v. Maryland, 395 U.S. 784, 799, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969):

> Where a man has been convicted on several counts and sentenced concurrently upon each, and where judicial review of one count sustains its validity, the need for review of the other counts is not a pressing one since, regardless of the outcome, the prisoner will remain in jail for the same length of time under the count upheld. Rather than permit other cases to languish while careful review of these redundent counts is carried to its futile conclusion, judicial resources might be better employed by moving on to more pressing business.

Not only will a resolution of this issue not have any impact on Respondent, it will have minimal, if any, impact on the criminal justice system. Both the crimes of rape and incest have been extant in Kentucky in their present form since January 1, 1975. But as the Supreme Court of Kentucky acknowledged in its published opinion, the issue facing it was "one of first impression". Hamilton v. Commonwealth, Ky., 659 S.W.2d 201, 202 (1983). The fact that such an issue arises once every nine years clearly demonstrates that it is not an issue which is burning to be resolved in order to ensure the proper administration of criminal justice in the land.

This point has apparently been implicitly admitted by Petitioner since it does not in any way argue that there are any compelling reasons why this issue must be resolved. It just simply argues that the Kentucky Supreme Court has erred in interpreting its own statutes. Furthermore, Petitioner does not even contend that Respondent has benefited in any way from the decision nor that he will be in any way affected by it. Clearly this is much ado about nothing.

CONCLUSION

For the foregoing reasons, Respondent respectfully moves this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

APPENDIX

PIKE CIRCUIT COURT
Division I

Action No. 81-CR-132

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs: FINAL JUDGMENT
SENTENCE OF IMPRISONMENT

VONDIA LEE HAMILTON a/k/a
VONDLE LEE HAMILTON DEFENDANT

* * *

The defendant having entered a plea of not guilty and on the 18th day of February, 1982, a jury having returned verdicts that the defendant was guilty of Count I, First-Degree Rape, and fixed his sentence at a term of life imprisonment in the state penitentiary, and guilty of Count II, Incest, and fixed his sentence at ten (10) years confinement in the state penitentiary.

On the 19th day of February, 1982, the defendant, Vondia Lee Hamilton, also known as Vondle Lee Hamilton, appeared in open Court with this attorney, Hon. Thomas W. Goodman, Jr. The defendant and his counsel waived the presentence investigation report and requested to be sentenced immediately. A signed Waiver is filed as part of the record herein.

The Court inquired of the defendant and his counsel whether they had any legal cause why judgment should not be pronounced and afforded the defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment.

Having given due consideration to the nature and circumstances of the crimes, and the history, character and condition of the defendant, the Court is of the opinion that imprisonment is necessary because probation would unduly depreciate the seriousness of the defendant's crimes. No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the defendant.

It is, therefore, ORDERED AND ADJUDGED that the defendant is guilty of the crime of first-degree rape and that he shall be confined in the state penitentiary for a term of life; and

It is further ORDERED AND ADJUDGED that the defendant is guilty of the crime of incest and that he shall be confined in the state penitentiary for a term of ten (10) years, said sentence to run concurrently with the life term.

It is further ORDERED AND ADJUDGED that the Pike County Sheriff shall deliver the defendant to the custody of the Department of Corrections hereunder at such location within

the state as the Department shall designate.

It is further ORDERED AND ADJUDGED that the defendant is hereby credited with the time spent in custody prior to the commencement of sentence, namely 39 days, toward service of the maximum term of imprisonment.

After imposing sentence, the Court informed the defendant that he had a right to appeal to the Supreme Court of Kentucky with the assistance of counsel; that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him; that an appeal must be taken within ten (10) days of the date of this judgment and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so requests. Bail on appeal is disallowed by Statute and the defendant is remanded to the custody of the Pike County Jailer until he can be transported to a state facility.

ENTERED this 22nd day of February, 1982.

Reed S. Alder
JUDGE

No. 83-1212

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Vondle Lee Hamilton, who is now being held in a Kentucky penal institution, asks leave of this Court, pursuant to Rule 46, to file the attached Brief in Opposition for Respondent in forma pauperis and without prepayment of costs.

The Respondent was allowed to proceed in forma pauperis on his direct appeal to the Supreme Court of Kentucky.

Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601
(502) 564-5212

COUNSEL FOR RESPONDENT

NO. 83-1212

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AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Vondle Lee Hamilton, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting this action are true.

1. Are you presently employed? YES_____ NO X

   a. If the answer is yes, state the amount of your salary per month and give the name and address of your employer.

   _____

   b. If the answer is no, state the date of last employment and the amount of the salary per month which you received.

   February 1982 Kentucky Coal Company - [illegible]

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment? Yes ( ) No (X)
   b. Rent payments, interest, or dividends? Yes ( ) No (X)
   c. Pensions, annuities, or life insurance payments? Yes ( ) No (X)
   d. Gifts or inheritances? Yes ( ) No (X)

e. Any other sources: Yes (✓) No ( )

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months.

Federal Tax Refund $2,552 income in 1983 approx $[illegible] [illegible] for living expenses

3. Do you own any cash or do you have money in a checking or savings account: Yes (✗) No ( ) (Include any funds in prison accounts).

If answer is yes, state the total value owned.

$45.51 prison account

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (✗)

If answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. [illegible]

I understand that a false statement or answer to any questions in this declaration will subject me to penalties for perjury.

[illegible]
Vondle Lee Hamilton

I declare under penalty of perjury that the foregoing is true and correct. Signed this 7th day of February, 1984.

[illegible]
Vondle Lee Hamilton

Sworn and subscribed to before me by Vondle Lee Hamilton on this _____ day of February, 1984.

NOTARY PUBLIC - STATE AT LARGE

My Commission Expires: _____

CERTIFICATION OF AMOUNT OF FUNDS
IN PRISONERS' INSTITUTIONAL ACCOUNT

I, Jennifer Morrison, of Northpoint Training Center do hereby certify that Vondle Lee Hamilton, according to the records in the Office of the Chief Clerk has the sum of $ 45.57 in his personal account as of this 21st day of February, 1984.

Jennifer Morrison
CERTIFYING OFFICER

Custodian, Inmate Accts.
TITLE
2-21-84

NO. 83-1212

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CERTIFICATE OF SERVICE

I, Timothy T. Riddell, counsel for respondent, hereby certify that the attached Brief For Respondent in Opposition, Appearance Form, Motion for Leave To Proceed In Forma Pauperis and Affidavit of Indigency were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and to counsel for respondent, Hon. David L. Armstrong, Attorney General, Commonwea'th of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 22nd day of February, 1984, by depositing same in a United States mail box, first class postage prepaid.

Timothy T. Riddell

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Duly witnessed and sworn to
before me, a Notary Public,
this 22nd day of February,
1984.

Brenda G. Hughes
Notary Public
State at Large

My Commission Expires: August 3, 1985

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AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28.2

I, Timothy T. Riddell, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for Respondent in the above-styled action.

3. The attached Brief For Respondent In Opposition, Appearance Form, Motion for Leave to Proceed In Forma Pauperis, Affidavit of Indigency, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Alexander L. Stevas, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543.

5. To my knowledge, the mailing of the aforementioned documents took place on February 22, 1984 which is within 30 days of the January 23, 1984 docketing in this Court of Petitioner's Petition For Writ of Certiorari.

Timothy T. Riddell

TIMOTHY T. RIDDELL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Duly witnessed and sworn to
before me, a Notary Public,
this 22nd day of February,
1984.

Brenda G. Hughes
Notary Public
State at Large

My Commission Expires: August 3, 1985